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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 908

RAILWAY EXPRESS AGENCY, INC.
Petitioner,

v.

RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, THE ORDER OF RAILROAD TELEGRAPHERS, AND RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Repondents.

BRIEF FOR PETITIONER IN REPLY

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BRIEF FOR PETITIONER IN REPLY

The reasons for granting the petition for certiorari are emphasized by certain aspects of the Board's brief in opposition, which has been adopted by the respondent unions.

(1) The Board does not attempt to deny the assertion in the petition that the decision below "conflicts in reasoning and in result" with the decisions of other courts of appeals, in the *Nicholas* and *Reynolds* cases, and with the decision of the Court of Claims in the *Pennsylvania R. Co.* case (Pet, at pp. 14-15), other than by stating that in those cases "the alleged 'employees' were themselves in-

dependently engaged to some extent in the same field of business as the alleged employer." (Br., at p. 21.) If the Board means to imply that the persons concerned in those cases performed the same type of work for others that they performed for the alleged "employer," this was true only to a very minor extent in the *Nicholas* and *Pennsylvania R. Co.* cases and true in the *Reynolds* case only in that the services were performed for more than one railroad. None of the cases made any point of this work for others, just as the court below did not rely on the fact that the merchant agents perform express services only in furtherance of their contracts with Railway Express. Furthermore, even if this alleged distinction had any importance, it does not affect the conflict concerning whether the common-law tests or a unique statutory test are applicable.

(2) Despite the devotion of 19 pages in its opinion (P.A. 626-644) in an effort to establish that "employee status determinations under [the Railroad Retirement and Unemployment Insurance] Acts depend not upon the application of common law principles, but upon the definite statutory tests set forth in the Act," *—a view which it persuaded the Court of Appeals to adopt—the Board now admits that the pertinent statutory definition "merely restates a principal element of the common-law rule . . ., which has, in fact, been called a 'control test'." (Br., at p. 24.) Moreover, the Board in its brief has not in any way controverted our discussion, at pp. 12-14 of the petition, of the legislative history of the Acts as showing that the Congress did not intend the Acts to cover persons traditionally regarded under the usual common law concepts as independent contractors.

It may be, as the Board contends in footnote 13 of its brief (p. 25), that the "decision below does not imply that

* P. A. 626-627.

the result would have been different had a common-law test been utilized." But, neither does the decision below imply that the result would not have been different if the Board and the Court of Appeals had applied the common-law "control" test which the Board now seems to concede to be properly applicable. Other decisions of the Court of Appeals for the Seventh Circuit almost conclusively establish that its decision would have been different if it had applied the common law "control" test.

Applying that test in *Williams* v. *United States*, 126 F. 2d 129, 132 (C.A. 7), the Court of Appeals stated that:

> "A number of elements have been enumerated as bearing upon the right to control, such as the right to hire and discharge persons doing the work . . ., the method and determination of the amount of payment of the workmen . . ., whether or not the person doing the business is engaged in an independent business or enterprise and, particularly, whether he stands to make a profit on the work of those working under him . . ., which party furnishes the tools or materials with which the work is done . . ., and who has control of the premises where the work is done."

We have shown in the petition that the merchant agents have the right to hire and fire the persons doing the work of the express agency for them, determine the compensation of such persons, stand to make a profit off the work of such persons, engage in independent businesses in many instances, and have control of the premises where the work is done. Equipment is furnished in part by the merchant agents and in part by petitioner.

Moreover, it is the view of the Seventh Circuit that the absence of the power to hire and fire the persons doing the work is virtually conclusive proof of the absence of the "control" necessary for an employer-employee relation-

ship. In holding that an orchestra leader is an independent contractor rather than an employee of the establishment where the orchestra performs, the Court of Appeals stated in the *Williams* case, at p. 133, that:

> "We have already concluded . . . that the establishments had no right to hire or discharge members of the orchestra. To our mind, this circumstance alone comes near being decisive. It is difficult to conceive of an employer-employee relationship without such a right on the part of the employer. It is equally inconceivable that such right should rest solely in the hands of the employee. Without this right there could be no effective control by an employer. As was said in *Pioneer Construction Co.* v. *Hansen*, 176 Ill. 100, 108, 52 N.E. 17, 19 '* * *' and, inasmuch as the right to control involves the power to discharge, the relation of master and servant will not exist unless the power to discharge exists. * * *' "

We have already noted in the petition (p. 19) that in *Party Cab Co.* v. *United States*, 172 F. 2d 87, the Court of Appeals for the Seventh Circuit, applying the common-law "control" test, held that taxi drivers were not employees of a taxi-cab company under circumstances very similar to those of the instant case. In any event, it seems clear that petitioner is entitled to a decision on the nature of its relationship with its merchant agents made on the basis of a proper understanding of the law, whatever may be the ultimate result. *Securities Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 92-93.

(3) The Board relies heavily on the doctrine that deference is due to administrative determinations having a reasonable basis in law and supported by substantial evidence in the record as a whole. That doctrine, however, is inapplicable where, as here, the agency has not "com-

plied with the statutory standards in its determination." *S.E.C.* v. *Central-Illinois Corp.*, 338 U. S. 96, 127-128. See, also, the cases cited at page 22 of the petition.

(4) While we believe that the Board's findings of fact inadequately reflect the record in a manner unfavorable to petitioner in many respects, those findings (other than the ultimate finding in terms of the statute) are accepted in the petition in recognition of the disinclination of this Court to undertake a reassessment of the evidence. The Board's brief in opposition, however, virtually ignores its own findings and ranges far and wide through the record to make statements of fact some of which were not subject to findings and, in our opinion, do not fully and fairly reflect the record.

This Court will not reassess the evidence on behalf of a Government agency any more than it would for petitioner. *F.T.C.* v. *Standard Oil Co.*, 355 U. S. 396, 401. The Board's ultimate finding must be supported by its basic findings of fact, *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 533, and if the basic findings are inadequate, as seems clearly to be the case here, the Court will not search the record to determine if the necessary additional findings could be made, *Phelps Dodge Co.* v. *Labor Board*, 313 U. S. 177, 195-196. Under these circumstances, we see no purpose in an elaborate discussion of the evidence of record. We shall, however, mention briefly a few of the more important aspects in which the Board's statement of facts in its brief does not reflect its findings or the record.

The Board did not find that petitioner is required to "closely supervise all its agencies" (Br., p. 10), or that petitioner maintains such supervision over the merchant agents. The only basic findings conceivably relating to supervision are numbers 23 through 27 (P.A. 610-611)

which merely recount the fact that the merchant agents account to petitioner in certain respects and remit the funds collected by them. While the record indicates that petitioner's route agents occasionally visited the merchant agents, the Board made no findings in this regard. With respect to the extent of these visits, see footnote 14 at page 19 of the petition. The Board's findings (Nos. 18-19, P.A. 608-609), unlike its statement of facts (Br., pp. 10-11), recognize that all merchant agents have not received copies of petitioner's "General Rules and Instructions," and that some of the rules expressly do not apply to merchant agents or else do not relate to the duties of merchant agents, as well as not being applicable to agencies whose business does not include specific operations. The Board did not find that "knowledge of the various rules and instruction is essential to the transaction of express business by all agents, including merchant agents." (Br., p. 11.) The record contains evidence that the General Rules and Instructions are sufficiently unimportant with respect to operation of the merchant agencies for petitioner to leave to the discretion of its division superintendents the decision of whether to furnish the merchant agents with a copy, and some division superintendents have not done so (P.A. 496).

(5) The Board relies on *Western Union Tel. Co.* v. *McComb*, 165 F. 2d 65 (C.A. 2), a case arising under the Fair Labor Standards Act with respect to agents of Western Union. Unlike the Railroad Retirement and Unemployment Insurance Acts, the coverage of the Fair Labor Standards Act is not limited to "common law employee categories." *Walling* v. *Portland Terminal Co.*, 330 U. S. 148, 150. We may note, however, that *Blankenship* v. *Western Union Tel. Co.*, 161 F. 2d 168 (C. A. 4), held that the Western Union agents there involved were not em-

ployees of Western Union for purposes of the Fair Labor Standards Act. The facts of the realationship as disclosed in the *Blankenship* case were much closer to the facts in this case than were those of the *McComb* case, where Western Union "exercised full control over the manner in which" the business was conducted (165 F. 2d, at p. 69).

(6) The Board states in footnote 11 at page 23 of its brief that petitioner "incorrectly" asserted that the common-law tests are applied in determining the coverage of the Federal Employers Liability Act. We believe the Court will find that it is the Board that is in error. The cases cited by the Board are concerned with the issue of liability rather than coverage. The coverage cases were expressly distinguished by the Court in footnote 5 to its opinion in *Sinkler* v. *Missouri Pacific R. Co.*, No. 133, this Term, decided April 28, 1958 (26 Law Week 4253, 4255), on the ground that: "The issue in each of those cases was whether the plaintiff was an employee of the defendant railroad."

Respectfully submitted,

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